A

WIRAMUDA (M) SDN BHD
v. KETUA PENGARAH HASIL DALAM NEGERI

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
NALLINI PATHMANATHAN FCJ
B VERNON ONG LAM KIAT FCJ
ZABARIAH MOHD YUSOF FCJ
MOHAMAD ZABIDIN MOHD DIAH FCJ
[CIVIL APPEAL NO: 01(f)-38-08-2022(W)]
31 MAY 2023
C [2023] CLJ (JT17)

Abstract – *Section 4C of the Income Tax Act 1967 has rendered art. 13 of the Federal Constitution illusory because, having received what amounts to an adequate compensation under art. 13, the landowner now* D *has to pay tax under s. 4C for the compensation received. This effectively results in the landowner getting less of the compensation and this amounts to an infringement of art. 13. Section 4C is thus unconstitutional and liable to be struck down.*

E ***CONSTITUTIONAL LAW:*** *Fundamental liberties – Right to property – Constitutionality of s. 4C of Income Tax Act 1967 – Lands compulsorily acquired by State Government for construction of highway – Compensation received by landowner for acquisition of lands subjected to tax – Whether s. 4C in contravention with art. 13(2) of Federal Constitution – Whether s. 4C deprives landowner of* F *adequate compensation granted in accordance with Land Acquisition Act 1960 – Whether s. 4C constitutional*

REVENUE LAW: *Income tax – Compensation – Lands compulsorily acquired by State Government for construction of highway – Compensation received by landowner for acquisition of lands subjected to tax – Whether s. 4C of Income Tax* G *Act 1967 in contravention with art. 13(2) of Federal Constitution – Whether s. 4C deprives landowner of adequate compensation granted in accordance with Land Acquisition Act 1960*

WORDS & PHRASES: *'adequate compensation' – Federal Constitution, art. 13(2)* H *– Whether compensation from compulsory acquisition form of profit or gain – Whether charging income tax on compensation received would mean that landowner had not received adequate compensation for land acquired*

The lands belonging to the appellant were compulsorily acquired by the State Government of Selangor for the construction of the SUKE Highway. After I the appellant received the amount of compensation, the respondent requested

the appellant to furnish, *inter alia*, a complete statement of account for year end 2014 until 2018, a completed tax calculation for the same period, the compensation offered for the acquisition of the lands and the amount of compensation received. The appellant furnished all the documents requested. The respondent then informed the appellant that the compensation for the acquisition of the lands was subject to tax under ss. 4C and 24(1)(aa) of the Income Tax Act 1967 ('Act'). The respondent further issued to the appellant a notice of assessment for year of assessment 2018 for the amount of RM52,966,517.27. Aggrieved, the appellant commenced an application for judicial review at the High Court, challenging the decision of the respondent. Dismissing the appellant's application, the High Court held that, *inter alia*, (i) sections 4C and 24 of the Act were valid and not inconsistent with the Federal Constitution ('FC') as both provisions empowered the respondent to impose tax on the compensation for the compulsory acquisition of the lands which were stock in trade; and (ii) the appellant was compensated for the acquisition of the lands and whether there was adequate compensation under art. 13 of the FC was an issue between the land administrator and the appellant and not in relation to the respondent. The appellant's appeal to the Court of Appeal bore no success; the Court of Appeal affirmed the decision of the High Court. Hence, the present appeal. The primary question that arose for determination was whether s. 4C of the Act was in contravention with art. 13(2) of the FC as it deprived the appellant of adequate compensation granted in accordance with the Land Acquisition Act 1960 ('primary question').

Held (allowing appeal)

Per Mohamad Zabidin Mohd Diah FCJ delivering the judgment of the court:

(1) The adequate compensation places the landowner in the original position as if the land had not been acquired, by referring to the market value of the land. Section 4C of the Act stated that gains or profits from a business include compensation on account of compulsory acquisition (amounts receivable arising from stock in trade parted with by compulsory acquisition). This meant that s. 4C of the Act considered compensation from compulsory acquisition to be a form of profit or gain. Profit and compensation have different meaning. Profit or gain, in its simplest sense, mean that there is a pecuniary advantage. Adequate compensation means that there is no more or no less than the loss resulting from the compulsory acquisition of the land and so, it places a landowner in the same financial position as he would have been in had his land not been compulsorily acquired. Simply put, the landowner earns no profit from the adequate compensation. (paras 42, 43 & 45)

(2) Section 4C of the Act was fundamentally flawed, in providing that a business' profits or gains include compensation from compulsory acquisition, as an adequate compensation had no element of profit or gain, nor any pecuniary advantage. Since the landowner, in receiving compensation, is put back in his original position and gains no earning or pecuniary advantage, charging income tax on the compensation received would mean that the landowner had not, in fact, received adequate compensation for the land acquired. As such, s. 4C of the Act infringed the landowner's right to adequate compensation under art. 13(2) of the FC. (paras 46 & 47)

(3) Section 4C of the Act had taken away the safeguard of adequate compensation as guaranteed under art. 13(2) of the FC and it had the effect of reducing the compensation paid to the landowner/taxpayer such that the landowner/taxpayer would no longer be receiving adequate compensation under art. 13(2) of the FC. The primary question was answered in the affirmative. Section 4C of the Act was thus unconstitutional and liable to be struck down. (paras 51 & 54)

Bahasa Melayu *Headnotes*

Tanah-tanah milik perayu telah diambil secara wajib oleh Kerajaan Negeri Selangor untuk tujuan pembinaan Lebuhraya SUKE. Selepas perayu menerima jumlah pampasan, responden meminta perayu mengemukakan, antara lain, penyata akaun yang lengkap untuk tahun 2014 hingga 2018, pengiraan cukai yang lengkap untuk tempoh yang sama, pampasan yang ditawarkan untuk pengambilan tanah-tanahnya dan jumlah pampasan yang diterima. Perayu mengemukakan dokumen-dokumen yang dikehendaki. Responden lalu memaklumkan perayu bahawa pampasan untuk pengambilan tanah-tanahnya tertakluk pada cukai bawah ss. 4C dan 24(1)(aa) Akta Cukai Pendapatan 1967 ('Akta'). Responden seterusnya mengeluarkan notis taksiran untuk tahun taksiran 2018, pada perayu, berjumlah RM52,966,517.27. Tidak berpuas hati, perayu memulakan permohonan semakan kehakiman di Mahkamah Tinggi, mencabar keputusan responden. Menolak permohonan perayu, Mahkamah Tinggi memutuskan bahawa, antara lain, (i) ss. 4C dan 24 Akta adalah sah dan tidaklah tidak selari dengan Perlembagaan Persekutuan ('PP') kerana kedua-dua peruntukan tersebut memberi kuasa kepada responden untuk mengenakan cukai atas pampasan untuk pengambilan secara wajib atas tanah-tanah iaitu stok dalam dagangan; dan (ii) perayu telah dipampas untuk pengambilan tanah-tanahnya dan sama ada terdapat pampasan yang memadai bawah per. 13 PP adalah isu antara pentadbir tanah dengan perayu dan tidak berkaitan dengan responden. Rayuan perayu ke Mahkamah Rayuan tidak berjaya; Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi. Maka timbul rayuan ini. Soalan

utama yang berbangkit untuk diputuskan adalah sama ada s. 4C Akta bercanggah dengan per. 13(2) PP kerana menafikan perayu pampasan yang memadai yang diawardkan selaras dengan Akta Pengambilan Tanah 1960 ('soalan utama').

Diputuskan (membenarkan rayuan)
Oleh Mohamad Zabidin Mohd Diah HMP menyampaikan penghakiman mahkamah:

(1) Pampasan yang memadai meletakkan pemilik tanah dalam kedudukan asal seolah-olah tanahnya tidak diambil, dengan merujuk pada nilai pasaran tanah. Seksyen 4C Akta menyatakan bahawa perolehan atau keuntungan daripada perniagaan adalah termasuk pampasan daripada pengambilan secara wajib (jumlah yang diterima yang berbangkit daripada stok dalam dagangan terpisah dengan pengambilan secara wajib). Ini bermaksud s. 4C Akta menganggap pampasan daripada pengambilan secara wajib sebagai satu bentuk keuntungan atau perolehan. Keuntungan dan pampasan mempunyai maksud yang berbeza. Keuntungan atau perolehan, dalam erti kata paling mudah, bermaksud faedah kewangan. Pampasan yang memadai pula bermaksud tidak lebih atau tidak kurang daripada kerugian susulan pengambilan tanah secara wajib dan, oleh itu, meletakkan pemilik tanah dalam kedudukan kewangan yang sama seperti dia akan berada jika tanahnya tidak diambil secara wajib. Ringkasnya, pemilik tanah tidak memperoleh keuntungan daripada pampasan yang memadai.

(2) Seksyen 4C Akta, secara asasnya, cacat kerana memperuntukkan bahawa keuntungan atau perolehan perniagaan adalah termasuk pampasan daripada pengambilan secara wajib kerana pampasan yang memadai tidak mempunyai elemen keuntungan atau perolehan mahu pun apa-apa faedah kewangan. Oleh kerana pemilik tanah, apabila menerima pampasan, diletakkan dalam kedudukan asalnya dan tidak menerima apa-apa perolehan atau faedah kewangan, pengenaan cukai pendapatan pada pampasan yang diterima bermaksud pemilik tanah sebenarnya tidak menerima pampasan yang memadai untuk tanah yang diambil. Oleh itu, s. 4C Akta melanggar hak pemilik tanah terhadap pampasan yang memadai bawah per. 13(2) PP.

(3) Seksyen 4C Akta menyisihkan perlindungan pampasan yang memadai yang dijamin bawah per. 13(2) PP dan mempunyai kesan mengurangkan pampasan yang dibayar pada pemilik tanah/pembayar cukai hinggakan pemilik tanah/pembayar cukai tidak lagi menerima pampasan yang memadai bawah per. 13(2) PP. Soalan utama dijawab secara afirmatif. Oleh itu, s. 4C Akta tidak berperlembagaan dan wajar dibatalkan.

Case(s) referred to:

Commissioner of Taxes v. C W(Pvt) Ltd [1990] 1 LRC (Const) 544 ***(refd)***
Director of Buildings And Lands v. Shun Fung Ironworks Ltd [1995] 1 All ER 846
Horn v. Sunderland Corporation [1941] 2 KB 26 ***(refd)***
Ketua Pengarah Hasil Dalam Negeri v. Penang Realty Sdn Bhd & Another Appeal [2006] 2 CLJ 835 CA ***(refd)***
Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri [1994] 3 CLJ 540 SC ***(refd)***
Nelungaloo Pty v. The Commonwealth And Others [1948] 75 CLR 495 ***(refd)***
NV Multi Corporation Bhd & Ors v. Suruhanjaya Syarikat Malaysia [2005] 1 LNS 76 HC ***(refd)***
Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***
State of West Bengal v. Mrs Bela Banerjee And Others 1954 AIR 170 ***(refd)***
Station Hotels Bhd v. Malayan Railway Administration [1976] 1 LNS 146 FC ***(refd)***
Tenaga Nasional Bhd v. Bukit Lenang Development Sdn Bhd [2019] 1 CLJ 42 FC ***(refd)***

Legislation referred to:

Federal Constitution, arts. 4(1), 13(1), (2), 96
Income Tax Act 1967, ss. 4(a), 4C, 24(1)(aa), 99(1)
Land Acquisition Act 1960, s. 38(5)
Real Property Gains Tax Act 1976, Schedule 2 para. 3(f)

For the appellant - DP Naban, S Saravana Kumar, Fiona Bodipalar, Yap Wen Hui, Pan Shan Ping & Alan Ng; M/s Bodipalar Ponnudurai De Silva
For the respondent - Hazlina Hussain, Ahmad Isyak Mohd Hassan, Mohd Harris Hanapi & Mohamad Asyraf Zakaria; Inland Revenue Board of Malaysia

[Editor's note: For the Court of Appeal judgment, please see Wiramuda (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2022] 6 CLJ 869 (overruled); Appeal from High Court, Kuala Lumpur; Application for Judicial Review No: WA-25-273-06-2019 (overruled)).]

Reported by Najib Tamby

JUDGMENT

Mohamad Zabidin Mohd Diah FCJ:

Introduction

[1] This is an appeal by Wiramuda (M) Sdn Bhd (the appellant) against the decision of the Court of Appeal on 7 March 2022 affirming the decision of the High Court. The High Court had dismissed the appellant's application for judicial review to quash the notice of assessment for year assessment 2018 dated 31 May 2019 issued by the Director General of the Inland Revenue (the respondent).

[2] Leave was granted by this court to the appellant to appeal on the following seven questions of law:

(i) whether s. 4C and s. 24(1)(aa) of the Income Tax Act 1967 ("ITA 1967") which were enacted through the Finance Act 2014 are unconstitutional, null, void and of no legal effect on the ground that it contravenes art. 13(2) of the Federal Constitution?

(ii) whether s. 4C of the ITA 1967 is in contravention with art. 13(2) of the Federal Constitution as it deprives the appellant of adequate compensation granted in accordance with the Land Acquisition Act 1960 ("LAA 1960")?

(iii) whether art. 4(1) of the Federal Constitution is applicable in light of s. 4C of the ITA 1967 being inconsistent with art. 13(2) of the Federal Constitution?

(iv) whether the presumption of the constitutionality of s. 4C of the ITA 1967 is a rebuttable presumption?

(v) whether the appellant's land (which was compulsorily acquired under the LAA 1960) was held as stock in trade or as fixed asset is an irrelevant fact to determine the constitutionality of s. 4C and s. 24(1)(aa) of the ITA 1967?

(vi) whether by reason of the fact the applicant's land had been consistently held and described as fixed asset in its audited accounts (with no other contrary evidence to suggest otherwise) proves this fact and discharges the burden of proof that the appellant's land is a fixed asset?

(vii) whether an award of compensation arising from compulsory land acquisition should be subject to real property gains tax under the Real Property Gains Tax Act 1976 ("RPGTA 1976"), instead of income tax under s. 4C of the ITA 1967?

[3] On 9 December 2022, after hearing submissions of both sides, we unanimously allowed the appeal by answering question (ii) in the affirmative. The appellant at the outset had withdrawn questions (vi) and (vii) and we found no necessity to answer the rest of the questions posed.

Background Facts

[4] Briefly, the relevant facts are as follows.

[5] The appellant owned four parcels of lands, namely HS(D) 25128, PT25163 ("25163"); HS(D) 25129, PT25164 ("25164"); HS(D) 25130, PT25165 ("25165"); and HS(D) 25132, PT25167 ("25167"), (collectively referred to as the lands).

[6] At some point of time, the appellant had carried out quarrying activities on certain parts of the lands where the appellant received income from the sale of quarry rocks. The quarry activities ended in 2011 and the lands remained dormant since then.

[7] Sometime in 2017, the lands were compulsorily acquired by the State Government of Selangor for the project of SUKE Highway. The amount of compensation awarded by the land administrator for the acquisition was objected to by the appellant. The objection was referred to the High Court under s. 38(5) of the LAA 1960. No further issue arose out of the amount of compensation awarded by the High Court.

[8] Nonetheless, after the appellant received the amount of compensation, *vide* a letter dated 12 February 2019 the respondent requested the appellant to furnish, among others, a complete statement of account for year-end 2014 until 2018, a complete tax calculation for the same period, the compensation offered for the acquisition of the lands in Form H, and the amount of compensation received. The appellant furnished all the documents as requested.

[9] Thereafter, the respondent *vide* a letter dated 28 February 2019 informed the appellant that the compensation for the acquisition of the lands was subject to tax under ss. 4C and 24(1)(aa) of the ITA 1967.

[10] After various meetings and correspondences, the respondent issued to the appellant a notice of assessment for year assessment 2018 dated 31 May 2019 for the amount of RM 52,966,517.27.

Proceedings In The High Court

[11] Aggrieved by the decision of the respondent, the appellant filed an application for judicial review in the High Court seeking for, *inter alia*, the following reliefs:

(i) an order for *certiorari* to quash the respondent's decision in the form of the notice of assessment for year assessment 2018 dated 31 May 2019 on the grounds that the said decision of the respondent in this respect was illegal, void, unlawful and/or in excess of authority, had been irrational and/or unreasonable, and resulted in a denial of the appellant's legitimate expectations as s. 4C of the ITA 1967 is not applicable;

(ii) a declaration that the sum amounting to RM202,552,569.50 received by the appellant for the alleged compulsory acquisition of its parcels of land is not compensation under s. 4C of the ITA 1967 even if the said section is valid in law;

(iii) a declaration that s. 4C of the ITA 1967 is unconstitutional and liable to be struck down on the ground that it purports to take away a person's right to receiving adequate compensation for the compulsory acquisition of land guaranteed by art. 13(2) of the Federal Constitution; and

(iv) a declaration that the lands acquired by the State Authority were not the appellant's stock in trade and thus is subject to real property gains tax, whereby under para. 3(f) of Schedule 2 of the Real Property Gains Tax Act 1976 (RPGTA 1976), the disposal price is deemed equal to the acquisition price and there is accordingly no gains in respect of which real property gains tax may be charged.

[12] The issue to be determined by the High Court was whether the respondent may impose tax on the compensation received by the appellant for the acquisition of the lands under the LAA 1960.

[13] Essentially, the learned High Court Judge made the following findings:

(i) that ss. 4C and 24 of the ITA 1967 empowers the respondent to impose tax on the compensation for the compulsory acquisition of the lands which are stock in trade;

(ii) that ss. 4C and 24 of the ITA 1967 were valid and not inconsistent with the FC while art. 96 of the FC allows the respondent to impose tax on the appellant through the law;

(iii) the appellant was compensated for the acquisition, and whether there was adequate compensation under art. 13 of the Federal Constitution was an issue between the land administrator and the appellant, and not in relation to the respondent; and

(iv) the appellant's challenge to the notice of assessment for year assessment 2018 involved question of facts which should be dealt with by the Special Commissioners of the Income Tax (SCIT), and that the appellant should have filed its appeal to the SCIT under s. 99 of the ITA 1967.

[14] Since the appellant failed to prove that the respondent's decision was tainted with illegality, irrationality, procedural impropriety and/or disproportionality, the learned High Court dismissed the appellant's application for judicial review.

Proceedings In The Court Of Appeal

[15] Dissatisfied, the appellant appealed to the Court of Appeal. The core issues for the determination of the Court of Appeal were:

(i) whether s. 4C of the ITA 1967 is unconstitutional for contravention of art. 13(2) of the Federal Constitution;

(ii) whether the appellant can bypass the alternative remedy of appeal to the SCIT under s. 99(1) of the ITA 1967; and

(iii) whether the appellant's lands compulsorily acquired are stock in trade as envisaged under s. 4C and 24(1)(aa) of the ITA 1967.

[16] The Court of Appeal held that s. 4C of the ITA 1967 is constitutional on the ground that the appellant was not deprived of its right to adequate compensation for the compulsory acquisition of the lands and that the appellant has the right to object to the amount of compensation by way of land reference to the High Court which was done in the present case.

[17] In respect of the alternative remedy under s. 99(1) of the ITA 1967, the Court of Appeal was of the view that it is trite that where an alternative remedy exists, the remedy by way of judicial review could only be exercised in very exceptional circumstances. It was held that there was no special or exceptional circumstance that entitled the appellant to bypass the alternative remedy under s. 99(1) of the ITA 1967.

[18] On the issue of whether the lands are stock in trade, the Court of Appeal held that it is a question of fact which should be determined by the SCIT and not the High Court in an application for judicial review.

[19] Consequently, the Court of Appeal unanimously dismissed the appellant's appeal and affirmed the decision of the High Court.

Proceedings In The Federal Court

The Appellant's Submission

[20] The appellant placed reliance on the case of *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561 (FC) to argue that "adequate compensation" as envisaged in art. 13(2) of the Federal Constitution is the sum that would place the taxpayer in the same financial position as he would have been if there was no question of the subject land being compulsorily acquired.

[21] Learned counsel also referred to the case of *Station Hotels Bhd v. Malayan Railway Administration* [1976] 1 LNS 146; [1977] 1 MLJ 112 (FC) to submit that the right to adequate compensation for compulsory acquisition is fundamental in nature and must be preserved by the courts of law. And that, this fundamental nature has been recognised in the case of *Tenaga Nasional Bhd v. Bukit Lenang Development Sdn Bhd* [2019] 1 CLJ 42 (FC).

[22] It was argued by the appellant that, ss. 4C and 24(1)(aa) of the ITA 1967 purport to take away the safeguard of "adequate compensation" as protected under art. 13(2) of the Federal Constitution. It was further argued that both the said sections have the effect of reducing the compensation paid to the taxpayer, and thus the taxpayer would not be paid "adequate compensation" as required under art. 13(2) of the Federal Constitution.

[23] In this respect, learned counsel cited a case decided by the Supreme Court of Zimbabwe in *Commissioner of Taxes v. C W(Pvt) Ltd* [1990] 1 LRC (Const) 544, where it was ruled that the provision of taxing the compensation arising from the compulsory acquisition is unconstitutional.

[24] Learned counsel contended that in taxing the compensation received from the compulsory acquisition, ss. 4C and 24(1)(aa) of the ITA 1967 are unconstitutional as being inconsistent with art. 13(2) of the Federal Constitution.

[25] Learned counsel went on to submit that art. 13(2) of the Federal Constitution places a restriction on the powers of Parliament to pass a law providing for compulsory acquisition or use of property without providing adequate compensation; and that the doctrine of basic structure of the Constitution would be defeated if it was ruled that Parliament may enact laws which erode the fundamental rights guaranteed under art. 13(2) of the Federal Constitution. Thus, it was submitted that ss. 4C and 24(1)(aa) of the ITA 1967 violate the doctrine of basic structure of the Federal Constitution.

[26] In light of the foregoing, learned counsel submitted that ss. 4C and 24(1)(aa) of the ITA 1967 which seek to impose tax on compensation for compulsory acquisition should be declared void and unconstitutional as being inconsistent with art. 13(2) of the Federal Constitution.

The Respondent's Submission

[27] In gist, learned counsel for the respondent submitted that the taxing of the compensation received by the appellant from the compulsory acquisition under s. 4C of the ITA 1967 is in line with art. 96 of the Constitution and does not contravene art. 13(2) of the Constitution.

[28] It was argued that the introduction of ss. 4C and 24(1)(aa) of the ITA 1967 is intended to empower the respondent to impose tax on the compensation received from the compulsory acquisition of land by the Government under the LAA 1960 on condition that such land is a stock in trade, where the profit from the disposal will be taxed as a business income.

[29] Accordingly, learned counsel submitted that s. 4C read together with s. 4(a) of the ITA 1967 makes the compensation received from the compulsory acquisition as a business income which is taxable under s. 4(a) of the ITA 1967.

[30] It was further submitted that the appellant as a developer had in fact classified the asset as its current asset which is the appellant's stock in trade, and therefore the compensation for the compulsory acquisition falls within the ambit of s. 4C of the ITA 1967.

[31] Learned counsel also contended that the present case involves factual issues, in particular, whether the disposal of land is a stock in trade which require the examination of relevant documents and testimony of witnesses through a trial before the SCIT. Further, as the appellant has been adequately compensated, art. 13(2) of the Federal Constitution is irrelevant.

Our Decision

[32] As mentioned at the outset, we unanimously allowed the appeal by answering question (ii) in the affirmative. In the circumstances, in this judgment, we will only focus our discussion and analysis on question (ii). For convenience, question (ii) is reproduced:

> Whether s. 4C of the ITA 1967 is in contravention with art. 13(2) of the Constitution as it deprives the appellant of adequate compensation granted in accordance with the LAA I960.

[33] Pursuant to s. 4C of the ITA 1967, compensation on account of compulsory acquisition (amount receivable arising from stock in trade parted by compulsory acquisition) is considered as business income, and it is chargeable for income tax under s. 4(a) of the ITA 1967. Section 4C of the ITA 1967 reads as follows:

> **Gains or profits from a business arising from stock in trade parted with by any element of compulsion**
>
> 4C. For the purpose of paragraph 4(a), gains or profits from a business shall include an amount receivable arising from stock in trade parted with by any element of compulsion including on requisition or compulsory acquisition or in a similar manner.

[34] Whereas, s. 24(1)(aa) of the ITA 1967 provides for taxing the compensation receivable in the relevant basis period as follows:

> **Basis period to which gross income from a business is related**
>
> 24. (1) Where in the relevant period a debt owing to the relevant person arises in respect of:
>
> (a) any stock in trade sold in or before the relevant period in the course of carrying on a business;
>
> **(aa) any stock in trade parted with by any element of compulsion including on requisition or compulsory acquisition or in a similar manner, in or before the relevant period;**
>
> (b) any services rendered or to be rendered at any time in the course of carrying on a business; or
>
> (c) the use or enjoyment of any property dealt or to be dealt with at any time in the course of carrying on a business,
>
> the amount of the debt shall be treated as gross income of the relevant person from the business for the relevant period.
>
> (emphasis added)

[35] Sections 4C and 24(1)(aa) of the ITA 1967 were introduced *via* cl. 5 and cl. 9 respectively of the Finance Bill (No. 2) 2013 on 1 October 2013. The intention of Parliament to tax the compensation received from compulsory acquisition is seen in the explanatory statement to the Bill as follows:

> Clause 5 seeks to introduce a new s. 4C into Act 53 to clarify that any amount receivable by a person from the disposal of its stock in trade by any element of compulsion such as compulsory acquisition or forced sale is treated as gains or profits from a business ... This amendment has effect for the year of assessment 2014 and subsequent years of assessment.

[36] Clearly, s. 4C of the ITA 1967 was introduced to subject the compensation received for the compulsory acquisition of land on the premise that the compensation is gain or profit from business.

[37] The issue for our consideration was rather straightforward. It was whether s. 4C of the ITA 1967 contravenes art. 13 of the Federal Constitution.

[38] Article 13(1) of the Federal Constitution provides "No person shall be deprived of property save in accordance with law", while art. 13(2) states "No law shall provide for the compulsory acquisition or use of property without adequate compensation".

[39] The appellant argued that adequate compensation under art. 13(2) of the Constitution means that the sum would place the taxpayer in the same financial position as he would have been if there was no question of the subject land being compulsorily acquired. In particular, reference was made to *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561 (FC) ("*Semenyih Jaya*") where this court stated as follows:

> The term 'adequate compensation' is not defined in the Act.[1] In *Pentadbir Tanah Daerah Gombak v. Huang Heng (Lim Low & Sons) Sdn Bhd* [1990] 3 MLJ 282, the Supreme Court held that the basic principle governing compensation is that the sum awarded should, as far as practicable, place the person in the same financial position as he would have been in had there been no question of his land being compulsorily acquired (see Compulsory Acquisition and Compensation by Sir Frederick Corfield QC and RJA Carnwarth).
>
> The above principle is known as the principle of equivalence. By this principle, the affected land owners and occupants are entitled to be compensated fairly for their loss. But they should receive compensation that is no more or no less than the loss resulting from the compulsory acquisition of their land.

[40] The following cases from the commonwealth jurisdiction were also cited on the principle of equivalence:

(i) *Horn v. Sunderland Corporation* [1941] 2 KB 26;

(ii) *Director of Buildings And Lands v. Shun Fung Ironworks Ltd* [1995] 1 All ER 846;

(iii) *Nelungaloo Pty v. The Commonwealth And Others* [1948] 75 CLR 495; and

(iv) *State of West Bengal v. Mrs Bela Banerjee And Others* 1954 AIR 170.

[41] Given that the issue before us was not so much on whether the appellant has been awarded adequate compensation under art. 13(2) for the lands compulsorily acquired but whether s. 4C of the ITA 1967 contravenes art. 13, we do not think that we need to deliberate much on the principles of adequate compensation and equivalence.

[42] Suffice for us to state that, it is an established principle of law that the adequate compensation places the landowner in the original position as if the land has not been acquired, by referring to the market value of the land. And what amounts to market value is settled by a host of authorities.

[43] Reverting to s. 4C of the ITA 1967 it states that gains or profits from a business include compensation on account of compulsory acquisition (amounts receivable arising from stock in trade parted with by compulsory acquisition). This means that s. 4C of the ITA 1967 considers compensation from compulsory acquisition to be a form of profit or gain.

[44] The definition of profit was mentioned in the case of *NV Multi Corporation Bhd & Ors v. Suruhanjaya Syarikat Malaysia* [2005] 1 LNS 76; [2005] 6 MLJ 65 (HC):

> 'Profit' was defined in *Waldron v. MG Securities* [1975] VR 508 at p. 529 as:
>
> > One of the definitions of 'profit' given in the Oxford English Dictionary is 'that which is derived from or produced by some source of revenue'. Webster defines it as 'the income of invested property – it includes any benefit or advantage accruing from the management use or sale of property or from the conduct of business', and Dr Johnson defines it as 'Gain – pecuniary advantage1. It is in this sense that the word should be construed in this definition. (See also: *Maunder-Hartigon v. Hamiton* [1984] 2 ACLC 438 at p 447).
>
> ...
>
> In *Maunder-Hartigon v. Hamilton* ([1984] 2 ACLC 438 at p. 447) it was said that profit has been considered by Pape J in *Waldron v. MG Securities* as being 'the income of invested property – it includes any benefit or advantage accruing from the management, use or sale of property or from the conduct of business or as 'gain' – pecuniary advantages.

[45] Clearly, profit and compensation have different meanings. Profit or gain in its simplest sense mean that there is a pecuniary advantage. As stated in *Semenyih Jaya*, adequate compensation means that there is no more or no less than the loss resulting from the compulsory acquisition of the land and so it places a landowner in the same financial position as he would have been in had his land not been compulsorily acquired. Simply put, the landowner earns no profit from the adequate compensation.

[46] Section 4C of the ITA 1967 is therefore fundamentally flawed in providing that a business's profits or gains include compensation from compulsory acquisition, as an adequate compensation has no element of profit or gain, nor any pecuniary advantage. At the risk of repetition, the landowner whose land was compulsorily acquired was merely placed in a situation had the land not been acquired.

[47] Since the landowner in receiving compensation is put back in his original position, and gains no earning or pecuniary advantage, charging income tax on the compensation received will mean that the landowner has not in fact received adequate compensation for the land acquired. As such, it was our view that s. 4C of the ITA 1967 infringes on the landowner's right to adequate compensation under art. 13(2) of the Federal Constitution.

[48] At this juncture, we refer to *Ketua Pengarah Hasil Dalam Negeri v. Penang Realty Sdn Bhd & Another Appeal* [2006] 2 CLJ 835; [2006] 3 MLJ 597 (CA) ("*Penang Realty*") and *Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 540; [1994] 2 MLJ 713 (SC) ("*Lower Perak*"). In these two cases, it was held that compulsory acquisition of land could not constitute a sale as the element of compulsion has vitiated the intention to trade, and thus compensation received from compulsory acquisition should not be subject to income tax.

[49] *Penang Realty* and *Lower Perak* were of course decided prior to the introduction of ss. 4C and 24(1)(aa) of the ITA 1967. As stated by learned counsel for the respondent in her written submission, prior to the enactment of ss. 4C and 24(1)(aa) of the ITA 1967, the tax treatment under the ITA 1967 is to tax the compensation received on account of the compulsory acquisition of a property. With the decisions in *Penang Realty* and *Lower Perak*, the respondent saw the need to introduce s. 4C and s. 24(1)(aa), in particular, to treat compensation as profit or gain from business income to justify the imposition of tax.

[50] The fact however remains that the adequate compensation awarded to a landowner for a land compulsorily acquired has no element of profit or gain. By equating the adequate compensation awarded to such landowner as a gain for 'the disposal of a stock in trade', it runs contrary to the spirit of art. 13 which guarantees the right to property and the right to an adequate compensation for the deprivation of the property. In other words, s. 4C of the ITA 1967 has rendered art. 13 illusory because having received what

amounts to an adequate compensation under art. 13, the landowner now has to pay tax under s. 4C of the ITA 1967 for the compensation received. This effectively has resulted in the landowner getting less of the compensation and this amounts to an infringement of art. 13 of the Federal Constitution.

[51] Thus, we agreed with the appellant that s. 4C has taken away the safeguard of adequate compensation as guaranteed under art. 13(2) of the Federal Constitution and that it has the effect of reducing the compensation paid to the landowner/taxpayer such that the landowner/taxpayer would no longer be receiving adequate compensation under art. 13(2) of the Federal Constitution.

[52] Finally, we find it useful to refer to para. 3 of Schedule 2 of the Real Property Gains Tax Act 1976 (RPGTA 1976) which states:

> Transactions in which disposal price is deemed equal to acquisition price
>
> 3. (1) In the following cases the disposal price shall be deemed to be equal to the acquisition price, that is to say:
>
> ...
>
> (f) the disposal of an asset as a result of a compulsory acquisition under any law;

[53] The above provision clearly stipulates that a transaction involving the disposal of an asset as a result of compulsory acquisition is a transaction where the disposal price is deemed to be equal to its acquisition price. When the disposal price is deemed the same as the acquisition price, the transaction yields a nil-tax effect. Although the above provision relates to a different legislation, it supports the proposition that in a situation of a land being compulsorily acquired, there is no gain and no loss transaction and there is no profit that has been earned.

Conclusion

[54] For the reasons stated above, we answered question 2 in the affirmative, *ie*, that s. 4C of the ITA 1967 is in contravention of art. 13(2) of the Federal Constitution as it deprives the appellant of the adequate compensation awarded in accordance with the LAA 1960. Section 4C is thus unconstitutional and liable to be struck down. The appeal was accordingly allowed with no order as to costs. The orders of the courts below were set aside.

Endnote:

1. Land Acquisition Act 1960.